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IN THE

Supreme Court of the United States

October Term, 1969
No. 1014

OWEN B. LAMPMAN and THRIFTIMART, INC., a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

I.

Opinions Below 1

II.

Jurisdiction 2

III.

Questions Presented 3

IV.

A Similar Case Is Now Pending Before This Court 5

V.

Statement 8

A. The Initial District Court Proceedings 8

B. Initial Proceedings in Court of Appeals 10

C. Further Proceedings in District Court 11

D. Final Proceedings in the Court of Appeals 11

VI.

Reasons for Granting the Writ 13

A. Summary Statement of Reasons 13

B. Confusion Over Judicial Review 14

C. Confusion Among the Courts of Appeals Exists With Respect to Searches and Seizures on Business Property 15

D. Confusion Exists With Respect to the Federal Grand Jury 18

E. Important Questions of Law Are Presented .. 22

VII.

Conclusion 22

INDEX TO APPENDICES

	Page
Appendix A. Copy of Minute Order	1
Appendix B. Order, Dated September 10, 1968	2
Appendix C. Order Granting Petitioners' Motions to Make a More Complete Record on Appeal	8
Appendix D. Order, Dated February 26, 1969	11
Appendix E. Opinion of the United States Court of Appeals for the Ninth Circuit	14
Appendix F. Order, Dated December 2, 1969	18
Appendix G. Pertinent Rules Involved	19

TABLE OF AUTHORITIES CITED

Cases	Page
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509	3, 6
April 1956 Term Grand Jury, In re, 239 F.2d 363	6, 17, 20, 21
Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746	16
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194	8
Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727	3, 6, 15
Certain Chinese, etc., Application of, 19 F.R.D. 97	17
Cobbledick v. United States, 309 U.S. 323, 84 L.Ed. 783	5, 12, 14
Colonnade Catering Corporation v. United States, 410 F.2d 197	17
Continental Oil v. United States, 330 F.2d 347	12, 14, 17
Dean Rubber Manufacturing Company v. United States, 356 F.2d 161	17
Frank v. Maryland, 359 U.S. 360, 79 S.Ct. 804	16
Knoll Associates v. F.T.C., 397 F.2d 530	17
LaBuy v. Howes Leather Co., 352 U.S 249, 1 L.Ed. 2d 290	15
Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508	9
Sanders v. Russell, 401 F.2d 241	15
Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed.2d 152	15
Schwimmer v. United States, 323 F.2d 855	16
See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737	3, 6, 15, 16
Spahr v. Kaiser v. United States, 409 F.2d 1303	17

Page

United States v. Bondy, 171 F.2d 642 15

United States v. Cleary, 265 F.2d 459 20

United States v. Culver, 224 F.Supp. 419 6

United States v. Dickerson, 413 F.2d 1111 17

United States v. Habig, 413 F.2d 1108 17

United States v. Hammond Milling Co., 413 F.2d 608 17

United States v. J. B. Kramer Grocery Co. [Not yet reported] (CCA 8, November 28, 1969) 17

United States v. Morton Salt Company, 216 F.Supp. 250 20

United States v. Sheba Bracelets, Inc., 248 F.2d 134 17

United States v. Stanack Sales Co., 387 F.2d 849 17

United States v. Wells, 163 F. 313 19

United States, In re, 348 F.2d 624 15

Watkins, In re, 271 F.2d 771 15

Will v. United States, 389 U.S. 90, 19 L.Ed. 2d 305 .....5, 12, 14

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364 19

Miscellaneous

Charge of Mr. Justice Field, The Grand Jury, San Francisco, 30 Fed. Cas. 18,255, (1872), p. 992 19

Rules

Federal Rules of Criminal Procedure, Rule 6 ....4, 13, 18

Federal Rules of Criminal Procedure, Rule 6(a) 22

Federal Rules of Criminal Procedure, Rule 6(b) 22

Federal Rules of Criminal Procedure, Rule 6(d) 22

Page

Federal Rules of Criminal Procedure, Rule 6(e) ..5, 22

Federal Rules of Criminal Procedure, Rule 16 ....7, 13

Federal Rules of Criminal Procedure, Rule 16(a)-(3) 5

Federal Rules of Criminal Procedure, Rule 16(b) .. 5

Federal Rules of Criminal Procedure, Rule 16(e) 5

Federal Rules of Criminal Procedure, Rule 17(c) 15, 22

Statutes

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution Fourth Amendment ..15, 16

United States Constitution, Fifth Amendment 18

Textbooks

47 Boston University Law Review (1967), p, 551 .. 19

55 Columbia Law Review (1955), p. 1103 19

Edwards, The Grand Jury, p. 31 19

Edwards, The Grand Jury, pp. 28-29 19

74 Harvard Law Review (1961), p. 590 19

1 Holdsworth, History of English Law, p. 321 18

2 Pollock & Mailand, History of English Law, p. 642 18

Rex v. Shaftsbury [1681] 8th Howell's State Trials, p. 759 19

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Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petition of Owen B. Lampman and Thriftimart, Inc., for Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the Judgment of that Court entered in these cases October 31, 1969 (see description below), and a Judgment denying Petition for Rehearing entered December 2, 1969, respectfully shows:

I.

Opinions Below.

The orders and opinions of the District Court and the Court of Appeals for the Ninth Circuit are attached

to this Petition as appendices in chronological order. A copy of the Order of the District Court denying petitioners' motion in the alternative to (1) postpone the return of the subpoena to enable petitioners to file a motion to quash, (2) summarily quash the subpoena and order the Government to move formally for a subpoena duces tecum, or (3) summarily quash the subpoena duces tecum is attached hereto as Appendix A, page 1. The interim Order of the Court of Appeals dated September 10, 1968, was not reported. It is attached as Appendix B, pages 2 to 7. The District Court Order (not reported) dated December 10, 1968, denying petitioners' motion to take depositions is attached as Appendix C, pages 8 to 10. The Order (not reported) of the District Court refusing to make a further record and denying motion to quash dated February 26, 1969, is attached as Appendix D, pages 11 to 13. The Final Judgment of the Court of Appeals for the Ninth Circuit (not yet reported) is attached as Appendix E, pages 14 to 17. The Judgment (not yet reported) denying petition for rehearing but correcting the Final Judgment of the Court of Appeals is attached as Appendix F, page 18.

II.

Jurisdiction.

The Judgment of the Court of Appeals was entered October 31, 1969, (Appendix E) and Order Denying Petition for Rehearing and correcting the Judgment of the Court of Appeals was entered December 2, 1969, (Appendix F). The jurisdiction of this Court is invoked under 28 USC 1254(1).

III.

Questions Presented.

1. Whether a corporate owner of records and papers in its possession and its subpoenaed officer are entitled to court review of an attempt by the Internal Revenue Service and the Department of Justice to search and seize such records and papers by a subpoena duces tecum where:

(a) the subpoena dueces tecum does not delimit the confines of the search by designating the needed documents nor on challenge does the Government establish or attempt to establish that the papers and records are relevant in purpose and specific in directive.

(b) the subpoena duces tecum purportedly requires an appearance before a grand jury, but in truth and in fact the subpoena duces tecum was (1) filled in by an agent in the field for the Department of Justice, (2) without the knowledge of any grand jury or the Court, and (3) the subpoena was so issued by the agent in the field in order to defeat and circumvent the limitations imposed by statute and the Constitution on administrative summons and subpoenas and thereby destroy the effect of this Court's determinations in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737 (1967); and other cases, and to defeat this Court's requirements on searches and seizures by warrant expressed in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964), and other cases.

(c) where the subpoena duces tecum requires the delivery of the papers and records of the corporation to an illegally constituted grand jury so manipulated by the Government as to destroy the secrecy of the grand

jury, its protective function and the rules specifically limiting the persons who may be present or attend upon the grand jury.

(d) where the effect of the Order of the trial court refusing protection and the Order of the Court of Appeals refusing review is such that the result will be a final destruction of the constitutional rights and limitations of the corporation and its officer with respect to both the subpoena and a constitutionally constituted grand jury.

2. Whether the Department of Justice and the Internal Revenue Service are entitled to an unlawful search and seizure by subpoena duces tecum where they are forbidden such search and seizure by administrative summons or subpoena by reason of constitutional and statutory limitations; where no grand jury and no Court had knowledge of or authorized the subpoena search and seizure.

3. Whether searches and seizures should be forbidden where the stated and announced purpose is to deliver the papers searched and seized by subpoena duces tecum to special agents of the Internal Revenue Service in violation of the secrecy of the grand jury in order that such special agents may report to the grand jury only those things contained in the books and records which the special agents believe the grand jury ought to know.

4. Whether petitioners are entitled to a writ of mandate forbidding the abuse of the grand jury by the Department of Justice and the Internal Revenue Service where that abuse includes (a) a violation of the secrecy of the grand jury, (b) the admission of persons not included in Rule 6 before the grand jury, and (c) destroys the protective function of the grand jury.

IV.

A Similar Case Is Now Pending Before This Court.

On December 15, 1969, this Court granted certiorari in *United States of America v. Gifford-Hill-American, Inc., United Concrete Pipe Corporation and Lloyd R. Earl.* The petition for certiorari filed by the Solicitor General on behalf of the United States of America clearly raises constitutional questions concerning the secrecy of the grand jury and the basic function of the grand jury as well as questions concerning the right of review by mandate or appeal of orders made by the District Court dealing with the grand jury. In that case the District Court order involved Rules 6(e) [secrecy of proceedings and disclosure of grand jury]; 16(a)(3) [defendant's statements, reports of examinations and tests; defendant's grand jury testimony]; 16(b) [other books, papers, documents, tangible objects or places discoverable]; and 16(e) [protective orders with respect to discovery].

The opinion of the Court of Appeals for the Fifth Circuit attached to the Government's petition for certiorari shows that in *United States of America v. Gifford-Hill-American, Inc.,* the Government took a position with respect to review diametrically opposed to that taken in the case at bar. In fact both parties sought review by the Court of Appeals and the Court of Appeals was compelled to review the jurisdictional problem on its own motion. It considered *Will v. United States,* 389 U.S. 90, 19 L.Ed. 2d 305 (1967) and *Cobbledick v. United States,* 309 U.S. 323, 84 L.Ed. 783 (1940) and other cases and came to a conclusion the exact reverse of the Ninth Circuit in this case.

But the petition of the Government in *Gifford-Hill-American* is but one phase of a constitutional grand jury problem which has been growing for some sixty years and which has never been settled by this Court. If this Court reviews only *United States of America v. Gifford-Hill-American, supra,* it will review but a portion of the entire constitutional and statutory grand jury problem. If certiorari is granted in this case and the two are heard together, the Court will get a complete picture of the problem of constitutional limitations as they are applied to the grand jury and the problem of the Federal Rules of Criminal Procedure applicable under the circumstances. When the case at bar is added to the *Gifford-Hill-American* case, it will be seen that there is a Government policy which effectively converts the grand jury to an agency which is a mere dependent adjunct of the Department of Justice by (1) first issuing omnibus unconstitutional subpoenas without the knowledge of the grand jury to evade the search and seizure limitations on warrants [*Aguilar v. Texas, supra*] and on administrative summons and subpoenas [*See v. Seattle, supra; Camara v. Municipal Court, supra*]; (2) then using this information supposedly as a grand jury investigation but in fact as a means of turning the information searched and seized unlawfully over to the very Government agency to whom it would be denied otherwise [*In re April 1956 Term Grand Jury,* 239 F.2d 363 (CCA 7); *United States v. Culver,* 224 F.Supp. 419 (DC Md.)]) (3) by then having agents of the administrative department report to the grand jury after "winnowing" and copying only those matters which the agents believe the grand jury should know; (4) by then delivering all of

the transcripts and information to the United States Attorney's Office; (5) and then as to any person indicted claiming that no discovery may be had under Rule 16 since all of the information was simply found in grand jury transcripts and evidence and hence, the defendant could show no particularized need [See Petition of United States in *United States v. Gifford-Hill-American, Inc., et al.*]. This method of abusing the grand jury effectively accomplishes the following:

(a) It makes possible the evasion of constitutional limitations on searches and seizures and permits an intrusion not permitted by the Constitution or by the decisions of this Court.

(b) It makes possible the abuse of the subpoena power by claiming the subpoena to be that of a grand jury when in truth and in fact no grand jury ever considered the matter or even determined that it would be of any interest to the grand jury.

(c) It destroys the protective function of the grand jury guaranteed by the Constitution and makes it a mere "discovery device" in the hands of the public prosecutor, which discovery device is denied to the defendant.

(d) It results in the grand jury being completely controlled by reason of the fact that the supposed "grand jury evidence" procured by the unlawful search and seizure has been examined by special agents of the Internal Revenue Service (or any other agency of the Government) but the grand jury is permitted to know only those parts of the supposed contents of the books and records that the agent wants the jury to know.

(e) By this means, the "report" of the agent is not (1) under oath, and (2) the evidence favorable to the defendant or prospective defendant is suppressed without the knowledge of defendant or prospective defendant, contrary to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

(f) By this means, the public prosecutor can guarantee an indictment based on his determination, not on the determination of the grand jury.

(g) The entire proceedings are then claimed to be secret with no particularized need of the defendant indicted being shown to examine the proceedings, and the prosecutor then places himself in a position to impeach defense witnesses, to put them in fear of contradiction since they cannot review or read the grand jury transcript in advance, and finally, to tailor the case so that the constitutional protections insisted upon by the courts may be defeated.

V.

Statement.

A. The Initial District Court Proceedings.

The facts of this case start in September of 1967 when Mr. Frank Andy, a special agent of the Internal Revenue Service (hereafter "IRS") appeared at Thriftimart and asked to examine the books, records and papers of Thriftimart for the fiscal years ended March 31, 1962, March 30, 1963, March 28, 1964, March 27, 1965, and March 26, 1966. Mr. Andy was refused because he declined to make a statement of purpose and limiting statement of the books, records, papers and documents he wished to examine. Whereupon, on May

21, 1968, Mr. Andy served an administrative summons prepared by him upon Thriftimart, Inc., and Roger M. Laverty, Sr., then its President and Chief Executive Officer. A response was prepared for Thriftimart and Mr. Laverty, Sr. The response refused the summons for reasons including the refusal of the special agent to state his purpose and to specify the papers and documents. The response went into considerable detail and also pointed out, among other things, that the investigation was a re-examination for a purpose that was not legitimate under *Reisman v. Caplin,* 375 U.S. 440, 449, 84 S.Ct. 508, 513 (1964), and other cases.

Thereafter, the IRS, with the cooperation of the Attorney General, sought to have the same special agent examine Thriftimart's books, records and papers under the guise of a subpoena duces tecum returnable to the grand jury. The subpoena duces tecum was served on Lampman and Thriftimart August 9, 1968, and required an appearance before the grand jury August 19, 1968.

Mr. Andy informed counsel for petitioners that he did not claim that there had been a fraud against the Revenue of the United States. His purpose was to see whether or not he could find any crime or crimes which might have been committed. According to the Government the Grand Jury would not see or examine the books and records involved here. They would be examined by special agents of the Internal Revenue Service, who would then "report" to the Grand Jury what they, the special agents, thought the Grand Jury ought to know.

The Attorney General refused any extension of time by agreement, and Lampman and Thriftimart then filed

a motion in the United States District Court for the Central District of California for the purpose of obtaining sufficient time to file a motion to quash the subpoena and to support it with necessary supporting evidence or to forthwith quash the subpoena. Respondent Court summarily denied the motion [Appendix A, page 1].

Whereupon, Lampman and Thriftimart filed their petition for Writ of Prohibition or Mandate in the Court of Appeals for the Ninth Circuit.

Two similar cases involving subpoenas issued by the Attorney General and motions to quash on the part of the citizens involved came on for hearing before the District Court. In those cases appeals were taken.

B. Initial Proceedings in Court of Appeals.

Upon the filing of the petition for writ of Lampman and Thriftimart, the Court of Appeals issued a stay. The stay is still in effect and, as a result, the subpoena has not been enforced.

After a hearing before Honorable Stanley Barnes and Honorable Walter Ely, Circuit Judges, a written order [Appendix B, page 2] was made by the Court of Appeals further staying the subpoena in this case and in two other cases appealed about the same time. The order provided that Respondent ". . . is authorized to conduct any further hearings which, upon any motion of the petitioners, it [Respondent Court] may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions."

C. Further Proceedings in District Court.

Immediately upon the making of this order, Lampman and Thriftimart moved Respondent Court that Lampman and Thriftimart be permitted to prepare, file and serve a motion to quash the subpoena, and that the Court permit the preparation of an additional record as suggested by the order of the Court of Appeals. The motion to file a formal motion to quash subpoena duces tecum was granted by Respondent Court, but the District Court ordered that no depositions be taken [Appendix C, page 8]. This made impossible the production of evidence.

On February 26, 1969, the District Court made its order [Appendix D, page 11] denying the motion to quash and directing that the moving papers and opposition thereto be transmitted to the Court of Appeals in accordance with the Order of the Court of Appeals [Appendix B].

D. Final Proceedings in the Court of Appeals.

After the District Court refused to permit the making of a record as recommended by the Court of Appeals and denied the motions to quash, the record was certified to the Court of Appeals in accordance with its instructions, briefed by all parties and orally argued. It will be observed that the initial order of the Court of Appeals assumed jurisdiction [Appendix B].

Although the proceedings in the Court of Appeals commenced by Lampman and Thriftimart were commenced by petition for writ of prohibition or mandate, the proceedings of the other parties in the other cases, Lewis and Bolker, were brought to the Court on a notice of appeal. The Court of Appeals made no distinc-

tion between these methods of review by its order of September 10, 1968 [Appendix B]. In fact, no particular point was made of this except that the Government in its brief claimed that the case was not reviewable on petition for writ of prohibition or mandate and cited *Cobbledick v. United States,* 309 U.S. 323, and *Will v. United States,* 389 U.S. 90. At no time did it mention that at approximately the same time it was urging the Court of Appeals for the Fifth Circuit to accept jurisdiction on the basis of a petition for writ of mandate in a comparable case.

At the oral argument, no point was made concerning jurisdiction and it was assumed that the Court would review and make a determination upon the merits. To the surprise of these petitioners, the Court of Appeals rejected its own decision in *Continental Oil v. United States,* 330 F.2d 347 (CCA 9, 1964) which held that the Court had jurisdiction either by mandate or by appeal to review an order denying a motion to quash a subpoena duces tecum supposedly returnable to the grand jury and held that the Court had no jurisdiction under *Cobbledick v. United States, supra,* and *Will v. United States, supra,* to hear or consider the case [Appendix E, page 14]. The result of this opinion is that the motion to quash having been denied, these petitioners have no other remedy than by this petition for writ of certiorari to this Court to prevent the destruction of their constitutional rights against unlawful searches and seizures and their constitutional right to a valid and lawful grand jury.

VI.

Reasons for Granting the Writ.

A. Summary Statement of Reasons.

We agree with the Government in its petition for writ which was granted December 15, 1969, in *United States of America et al. v. Gifford-Hill-American, Inc., et al.* that the questions presented with respect to the integrity and constitutional efficacy of the grand jury represent serious and extraordinarily important questions which require the determination of this Court. The matter cannot be confined to so neat and narrow a slot as is suggested by the Government in that case. It apparently would like a decision based solely upon the interpretation of Rules 6 and 16 of the Federal Rules of Criminal Procedure. But that cannot be done without an inquiry into the constitutional organization and function of the grand jury. In addition, our case includes problems with respect to which the various courts of appeals are at odds and their opinions present to the district courts and to the lawyer attempting to advise business organizations a hopeless confusion which can only be resolved by this Court. We state the matter in outline form here:

1. The courts of appeals are in confusion and have rendered inconsistent opinions with respect to jurisdiction to review district court determinations pertaining to subpoenas duces tecum, indictments and discovery matters relating to the grand jury.

2. The courts of appeals are in confusion and have rendered inconsistent opinions with respect to searches and seizures initiated by the Department of Justice and by other agencies.

3. The cases are in confusion from the district court level to the Supreme Court level as to the function, limitation and constitutional position of the grand jury.

4. All of the foregoing constitute important and serious questions of law which must be decided in order to prevent this confusion and consequent flouting of the Constitution.

B. Confusion Over Judicial Review.

The problem of judicial review of interlocutory orders in cases involving businessmen, business regulation and like matters seems to create confusion among the various courts of appeals. Thus there is conflict between opinions within the Ninth Circuit. There is conflict between the Fifth Circuit and the Ninth Circuit. The conflict seems to revolve around the opinions of this Court in *Cobbledick v. United States,* 309 U.S. 323 (1940) and *Will v. United States,* 389 U.S. 97 (1967).

In *Continental Oil Co. v. United States,* 330 F.2d 347 (CCA 9, 1964) the Court of Appeals for the Ninth Circuit was asked to review an order of the trial court refusing to quash a subpoena duces tecum returnable to a grand jury. In that case, although *Cobbledick v. United States, supra,* was argued *in extenso,* the Court correctly held that *Cobbledick* did not apply to that case and that the subpoena should be quashed. The Court of Appeals for the Ninth Circuit went further and stated that review could be had either by prerogative writ or by appeal. This would seem to be precisely the holding of *Cobbledick* and *Will* where a constitutional issue is raised and the decision would in fact become final unless reviewed. This also con-

forms to the doctrine of this Court that the refusal to obey a subpoena duces tecum and the consequent conviction for contempt which would make the question of the subpoena duces tecum final and appealable is not a satisfactory alternative to a motion to quash. [*See v. Seattle, supra.*] Also, in the Federal Rules of Criminal Procedure, there is specific provision made for motions to quash subpoenas [Rule 17 (c)]. It would seem that this raises an absolute necessity for right of review in some form in the Court of Appeals.

The judgment here [Appendix E] is also contrary to the opinion in *United States v. Gifford-Hill-American, supra.*

See also:

Sanders v. Russell, 401 F.2d 241 (CCA 5, 1960);

In re Watkins, 271 F.2d 771 (CCA 5, 1959);

In re United States, 348 F.2d 624 (CCA 1, 1965);

United States v. Bondy, 171 F.2d 642 (CCA 2, 1948);

LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 1 L.Ed. 2d 290, 299 (1957);

Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed. 2d 152 (1964).

C. Confusion Among the Courts of Appeals Exists With Respect to Searches and Seizures on Business Property.

In 1967 this Court decided *Camara v. Municipal Court* and *See v. Seattle*. In these cases the Court specifically held that businesses and businessmen were entitled to protection under the Fourth Amendment against unreasonable searches and seizures and ex-

pressly overruled *Frank v. Maryland*, 359 U.S. 360, 79 S.Ct. 804 (1959), which had held to the contrary. In deciding *See v. Seattle* the Court expressly held that the Fourth Amendment requires that a subpoena to a business house must be sufficiently limited in scope, relevant in purpose and specific in directive that compliance will not be unreasonably burdensome. It also held that the Fourth Amendment requires that any inspection or subpoena must delimit the confines of the search by designating the needed documents in a formal subpoena.

A subpoena duces tecum is no different than a warrant, and the same requirements must be imposed on subpoenas duces tecum as are imposed on warrants.

Schwimmer v. United States, 323 F.2d 855, 860 (CCA 8, 1956);

Boyd v. United States, 116 U.S. 616, 622, 6 S.Ct. 524, 29 L.Ed. 746.

The courts of appeals seem to find it difficult to apply the Constitution to businesses and businessmen in accordance with the doctrine of the Court. Doubts are raised concerning consent and other factors which in a case involving a crime of violence would not trouble the courts. The result has been confusion among the courts of appeals and we find them going in various directions.

Apparently in order to eliminate the effectiveness of the Fourth Amendment, the Government has concluded that it can simply issue its own subpoenas, under the pretext that they are grand jury subpoenas, and by so doing, all of the rules required of administrative subpoenas and summons and warrants are eliminated. That is exactly what was done here.

In the following cases courts of appeals have forbidden warrantless searches and seizures of business property:

United States v. Stanack Sales Co., 387 F.2d 849 (CCA 3, 1968);

United States v. J. B. Kramer Grocery Co. [Not yet reported] (CCA 8, November 28, 1969);

Continental Oil Co. v. United States, 330 F.2d 347 (CCA 9, 1964);

Application of Certain Chinese etc., 19 F.R.D. 97 (USDC Cal., 1956);

Knoll Associates v. F.T.C., 397 F.2d 530 (CCA 7, 1968).

United States v. Dickerson, 413 F.2d 1111 (CCA 7, 1969);

United States v. Habig, 413 F.2d 1108 (CCA 7, 1969);

United States v. Sheba Bracelets, Inc., 248 F. 2d 134 (CCA 2, 1957);

On the other hand, the courts of appeals have refused to protect against searches and seizures on business property in the following cases:

United States v. Hammond Milling Co., 413 F.2d 608 (CCA 5, 1969);

Spahr and Kaiser v. United States, 409 F.2d 1303 (CCA 9, 1969);

Dean Rubber Manufacturing Company v. United States, 356 F.2d 161 (CCA 8, 1966);

In re April 1956 Term Grand Jury, 239 F.2d 263 (CCA 7, 1957);

Colonnade Catering Corporation v. United States, 410 F.2d 197 (CCA 2, 1969).

D. Confusion Exists With Respect to the Federal Grand Jury.

The grand jury is established by the Constitution. The Fifth Amendment to the Constitution provides *inter alia:*

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."

Rule 6, Federal Rules of Criminal Procedure, (see appendix G) establishes in rule form some but not all of the constitutional limitations necessary to the functioning of the grand jury in the manner contemplated by the Constitution.

At the adoption of the Constitution, the grand jury had two well-defined and established functions. Both functions required and still require that the grand jury be completely independent and subject only to limited control by the courts. No outside force, particularly agents and police officers such as special agents, prosecuting attorneys and others, can be permitted to destroy that independence.

One of these two established functions of the grand jury was the protection of witnesses, citizens and persons in their constitutional rights against the government. The primary function of the grand jury was not inquisitorial. The great interest of the founding fathers and draftsmen of the Constitution was not in the inquisitorial aspects of the grand jury but in its protective aspects.

2 *Pollock & Mailand, History of English Law,* 642 *et seq.;*

1 *Holdsworth, History of English Law,* 321 *et seq.;*

Rex v. Shaftsbury [1681] 8th Howell's State Trials, 759;

Edwards, The Grand Jury, page 31;

Stephen College's Case, Edwards, The Grand Jury, Pages 28 and 29;

Charge of Mr. Justice Field, The Grand Jury, San Francisco, 30 Fed. Cas. 18,255, pages 992, 994 and 995 (1872);

United States v. Wells, 163 F. 313, 327, 329 (USDC Idaho, 1909);

Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364 (1962).

This area of constitutional limitations is both neglected and important and deserves a determination by this court for the guidance of all courts.

See *Kuh, The Grand Jury Presentment: Foul Blow or Fair Play,* 55 Columbia Law Review, 1103 *et seq.* (1955);

The Grand Jury as an Investigatory Body, 74 Harvard Law Review 590 (1961);

Bartlett, Defendant's Right to an Unbiased Grand Jury, 47 Boston University Law Review 551 (1967).

In spite of the fact that the Constitution anticipates that a grand jury will be an independent protective tribunal, as well as an inquisitorial tribunal, this important constitutional function has not only been totally ignored over the past years but as we have pointed out, the Department of Justice has literally engaged in a program and policy to destroy it. The only function argued in recent cases for the grand jury is simply that of an investigating tool or adjunct of the prosecutor. In the pe-

tition of the solicitor general in *United States of America, et al. v. Gifford-Hill-American, Inc. et al.,* for writ of certiorari to the Fifth Circuit (granted December 15, 1969), the Court of Appeals' opinion attached to the petition as Appendix A, page 29, describes the grand jury ". . . as his [the prosecutors] own discovery device, with the subpoenaing of defense witnesses achieving much of the effect of a full-fledged deposition procedure."

In *United States v. Cleary,* 265 F.2d 459 (CCA 2, 1959), the grand jury is described as a "law enforcement agency" and an "investigative instrument of the prosecutor."

In *United States v. Morton Salt Company,* 216 F. Supp. 250 (USDC Minnesota, 1962), the court could see nothing wrong with the district attorney obtaining a subpoena to compel attendance before the grand jury when the grand jury was not even in session.

In re April 1956 Term Grand Jury, 239 F.2d 263 (CCA 7, 1956), a case relied on below by the Government, papers and records were subpoenaed by Government agents of the Internal Revenue Service who were then sworn as agents of the grand jury. They reported to the grand jury what they wanted it to know and yet the court held that this was a proper procedure. As we have indicated above in connection with the discussion of *United States v. Gifford-Hill-American, Inc.,* this means that the grand jury has been stripped of its independence; it is solely dependent upon the Department of Justice. The independence which it is supposed to have and which was guaranteed by the Constitution is gone. In order to control the grand jury

and determine that it will act as it is told to act, the agents of the Internal Revenue Service need only report what they want it to know and since it must act on their report, not on evidence, it could not exercise its protective function. The protective function of the grand jury has been destroyed by the doctrine of these cases.

It would seem that if the grand jury is nothing but an investigating tool, stripped of its protective function, then any subpoena issued for or on its behalf or by its master, the Department of Justice, must be limited and restricted just as any administrative summons or subpoena must be limited. In fact, such subpoenas duces tecum should be restricted in exactly the same fashion as warrants.

If on the other hand the grand jury is to be permitted to have independence and to re-assert its protective function and to become the master of the Department of Justice, not its slave, then subpoenas such as those here and in the case of *In re April 1956 Term Grand Jury*, 239 F.2d 263 (CCA 7, 1956), should be rejected by this court as inconsistent with the Constitution of the United States. In either event, subpoenas of the type here under consideration must be quashed.

In considering such subpoenas either the citizen is entitled to place an independent magistrate between himself and the prosecuting authority or he must be able to place an *independent grand jury* between himself and the prosecuting authority. The prosecuting authority cannot simply trample over the rights of citizens by converting the grand jury to its bounden slave and then issues its own subpoenas for whatever it may choose, thus evading the limitations, placed by the Constitution

upon the prosecuting authority and taking the supervision away from both the courts and the grand jury contemplated by the Constitution.

E. Important Questions of Law Are Presented.

This case not only presents the important questions raised by the confusion of the courts of appeals as set out above, it also raises important questions concerning the interpretation of Rules 6(a), 6(b), 6(d), and 6(e) with respect to grand juries and Rule 17(c) with respect to quashing subpoenas. The rules mentioned are attached as Appendix G.

This area of constitutional law is of great significance to every business, corporate or otherwise, to every labor union, and to every taxing and regulatory arm of government.

VII.

Conclusion.

We urge the Court to grant a writ of certiorari in this case.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioners.

APPENDIX A.

Copy of Minute Order.

"8/14/68 Counsel argue and the Motion to the Court on the issue of having a stay of time for the witness to appear before the grand jury or in the alternative having the subpoena duces tecum quashed. Court ords Motions denied. (JWC)."

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, v. United States District Court, for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents, United States of America, Real Party in Interest. No. 23173.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Gershon L. Lewis. No. 23177.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Joseph R. Bolker. No. 23178.

Before: BARNES and ELY, Circuit Judges.

While the background in these three matters is somewhat dissimilar, the identify of issues and requested relief justifies their combined treatment.

I. *No. 23173*

Owen B. Lampman is secretary of Thriftimart, Inc., hereinafter "Thriftimart." As such, he was served on Aug. 9, 1968, with a subpoena duces tecum, issued through the grand jury of respondent court, directing him to appear before the grand jury on Aug. 19, 1968, with extensive books and records of Thriftimart. Through counsel, petitioner learned that the subject of the grand jury's investigation was contributions to political campaigns and that the grand jury would not itself see the materials but would be informed of the contents of petitioners' records by special agents of the Internal Revenue Service acting as agents of the grand jury in their examination.

In September of 1967, the Internal Revenue Service had itself attempted to examina these documents. At that time the I.R.S. had stated its purpose as being a determination of whether or not any crime or crimes of any nature had been committed. Thriftimart's records had been audited and approved annually by the Service and those for 1962-1964 were, at the time of the summons, admittedly protected from another audit by the three year statute of limitations, unless fraud were charged, and no such claim was here made.

Thriftimart, citing both the Service's refusal to specify its purpose in the investigation and the statute of limitations, refused to produce the requested materials. In response, the Government served Thriftimart's president with an administrative summons on May 21, 1968, ordering his appearance with the previously requested records. Thriftimart again declined to produce the records and the Service took no action to enforce its summons. Petitioner's reaction to the grand jury subpoena was the filing with respondents of a motion containing three alternative orders. These were: 1) that the appearance date of the subpoena would be postponed one month to allow petitioners time to prepare a motion to quash the subpoena; or 2) that the court quash the subpoena and direct the Government to proceed through a formal motion for a subpoena duces tecum; or 3) that the subpoena be quashed.

Respondent denied the motion on Aug. 14, 1968, holding the subpoena to be adequate. Petitioners have now requested an order from this court that would: first, restrain all proceedings under the subpoena until after a hearing on a writ of mandamus to compel respondents to vacate the order and to provide petitioners

with an opportunity to file an adequate and appropriate motion to quash the subpoena; second, vacate the trial court's order that the subpoena was adequate; and third, order the trial court to postpone the subpoena's date for petitioner Lampman's appearance to allow time for a hearing pursuant to the requested writs.

II. *No. 23177*

Petitioner Gershon L. Lewis is vice-president and controller of Westdale Savings and Loan Association. On Aug. 7, 1968, he received a subpoena duces tecum from the grand jury acting in the related cases. This subpoena ordered him to appear on Aug. 20, 1968, and to present books and records of Westdale Savings and Loan Association for 1962-1966.

Petitioner had been served with a summons requesting similar books and records on Nov. 2, 1967. Contending that the summons raised constitutional questions then being litigated in the United States District Court for the Central District of California, petitioner requested that no action be taken on the summons until the pending proceedings were concluded. No subsequent enforcement action has been taken by the Service regarding the summons.

On Aug. 16, 1968, petitioner's motion to quash the subpoena was denied by the same District Court which had overruled similar motions by the petitioners, *supra*. That court also denied petitioner's motion for a one week stay pending appeal to this court. Petitioner now prays that this court grant a writ of mandamus or a writ of prohibition or, in the alternative, a stay pending appeal, which would excuse petitioner's

appearance before the grand jury until ordered by this court.

III. *No. 23178*

Petitioner Bolker, president of Wolpole Estates, Inc., was served with a subpoena duces tecum from the Grand Jury for the United States District Court for the Central District of California on Aug. 9, 1968. It directed him to appear on Aug. 20, 1968, with business records and books of Wolpole Estates, Inc. for the fiscal years 1962-1966.

These documents had previously been sought by the Internal Revenue Service; on Feb. 7, 1968, enforcement action was begun on a summons that had been made for them. Petitioner filed a counterclaim and application for a three-judge district court. After argument, the parties stipulated that further enforcement action on the summons would be held in abeyance and that matter continued until Oct. 1, 1968, or until a similar suit involving an application for a three-judge court, then on appeal in this court, was resolved.

On Aug. 15, 1968, petitioner filed a motion with the same court that had heard petitioner Lampman's application for time to file a motion to quash, *supra*. This motion sought a continuance of petitioner's appearance until Sept. 3, 1968, or until a time determined by the District Court judge sitting on the Government's enforcement proceedings for its summons. Petitioner stated that it was his intention to present that judge with a motion to quash the subpoena at this later date.

On Aug. 16, 1968, petitioner's motions to continue and to quash were denied, as was petitioner's sub-

sequent motion for a week's stay pending appeal to our court. Petitioner now seeks a writ of mandamus or a writ of prohibition or in the alternative, a stay pending appeal which would excuse the petitioner from appearing before the grand jury until a time determined by this court.

* * *

The petition in No. 23173 was presented to Judge Barnes, and at about the same time, the petitions in Numbers 23177 and 23178 were presented to Judge Ely. Judges Barnes and Ely conferred and determined that the two of them would act in cooperation in the determination of the three petitions, at least preliminarily. They invited informal oral argument on the part of the petitioners, of the respondent, and of the United States, and such oral presentation was made. The attorneys for the Government agreed that the times for the appearance by petitioners in response to the subpoenaes would be continued, pending the disposition of the petitions by the judges of this court.

Upon consideration, Judges Barnes and Ely have determined that each of the three petitions presents issues which should, according to the internal policy and practices of the court, properly be decided by a panel of three judges of the Court of Appeals, and, in line with such policy, Judges Barnes and Ely will summon a third judge to assist in the disposition of the three petitions. When the third judge has been designated, he, along with Judges Barnes and Ely, will decide if additional oral argument will be heard. Meanwhile, each of the parties will, within seven days from the date of this order, advise the court as to whether or not there is a desire to present oral argument before the three judges.

In aid of the jurisdiction of the Court of Appeals, it is directed that compliance with the subpoenaes questioned shall be stayed, until further order of this court.

Pending the final disposition of the three petitions, the District Court is authorized to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions. If the petitioners renew their motions to the District Court, and if the District Court decides to conduct any hearing, then the petitioners will immediately notify the Clerk of the Court of Appeals to the end that the judges concerned will be apprised of the possibility of a supplementation of the record.

/s/ STANLEY W. BARNES
/s/ WALTER ELY
United States Circuit Judges

APPENDIX C.

Order Granting Petitioners' Motions to Make a More Complete Record on Appeal.

United States District Court, Central District of California.

In the Matter of the Subpoena Duces Tecum Directed to Owen B. Lampman, etc. No. 2001 Misc.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Joseph R. Bolker, etc. No. 2005 Misc.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Gershon L. Lewis. No. 2006 Misc.

Filed, Dec. 10, 1968.

The above entitled matters are presently on appeal. The Circuit Court of Appeals has specifically authorized this Court to "conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions." Such motions have been made and the matters have been submitted to the Court for its decision.

This Court previously heard and rendered judgment in the case of *United States v. Ahmanson*, 67-489-JWC, which is now on appeal. In the main, the same questions determined there have been raised in these proceedings. In the *Ahmanson* case the Court over strenuous objections of the Government gave the respondents wide discovery opportunities, which they pursued

most extensively, but which produced little of substance.

The present motions were filed shortly before the appearance date before the Grand Jury and at a time when all arrangements for such a hearing had been completed. This Court felt that these motions had as their only purpose the harassment of the Internal Revenue Service and a delay in the investigation. Since some of the attorneys in these proceedings were also involved in the *Ahmanson* case, the Court felt that they could have as easily and as expeditiously prepared motions to quash, with such showing as they were able to make, as the motions to continue, which were made. In fact, in open Court, counsel were unable to assure the Court that they had any new material to present in these matters beyond that already submitted in support of their contentions in the *Ahmanson* case.

It now appears, however, that further appearances of the movants before the Grand Jury have been stayed until some yet undetermined time in the future, and there is no longer any great need for urgency. This being so, there seems to be no reason why petitioners should not be permitted to augment the record before the Circuit Court of Appeals within reasonable limits.

IT IS THEREFORE ORDERED that all the moving parties may have until December 20, 1968, to file motions to quash upon such grounds as they may wish to set forth and may, within such time, file such affidavits in support thereof as they may desire. The

respondents shall have until the 10th of January, 1969, within which to file such opposition as they may wish. The movants, then, shall have until the 20th of January, 1968, to reply and the matter will be heard Monday, January 27, 1969.

IT IS FURTHER ORDERED that there shall be no depositions or other discovery unless specifically permitted by the Court.

DATED: December 9, 1968.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX D.

Order.

United States District Court, Central District of California.

In the Matter of the Subpoena Duces Tecum directed to Owen B. Lampman, etc. Misc. No. 2001.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Joseph R. Bolker, etc. Misc. No. 2005

In the Matter of Grand Jury Subpoena Duces Tecum served upon Gershon L. Lewis. Misc. No. 2006.

Filed, Feb. 26, 1969.

The above entitled matters are presently on appeal. By order filed September 10, 1968, the circuit court authorized this court "to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the court of appeals a more complete record upon which to rest its disposition of the pending motions."

Thereafter, the petitioner in each case made a motion to make a more complete record. On December 9, 1968, this court determined that the petitioners should be permitted to augment the record within reasonable limits and provided that "the moving parties may have until December 20, 1968, to file motions to quash upon such grounds as they may wish to set forth and may, within such time, file such affidavits in support thereof as they may desire. The respondents shall have until the 10th of January, 1969, within which to file such opposition as they may wish. The movants, then, shall have until the 20th of January, 1969, to reply and the matter will be heard Monday, January 27,

1969. It is further ordered that there shall be no depositions or other discovery unless specifically permitted by the court."

Thereafter, in each of these matters renewal of the motion to quash the grand jury subpoena duces tecum was filed with supporting affidavit, and in each case the Government has filed its opposition thereto.

These papers present little, if anything, new but are mere repetitions and restatements of earlier arguments, all of which are presently before the circuit court of appeals. It appears to this court that petitioners' contentions are all matters of law and that each of these proceedings is in a posture suitable for consideration by the circuit court of appeals.

Petitioners have contended that they should have further discovery opportunities, but there has been no showing of any necessity therefor other than a desire on the part of the petitioners to interrogate agents and employees of the Internal Revenue Service in the hope of finding some evidence to support their contentions. About the only factual issue, if it be an issue, is the suggestion that the court should take judicial knowledge that in similar cases now pending upon appeal it has been "alleged" that agents of the Internal Revenue Service have been guilty of fraud. This court is familiar with one such case having heard it originally. In that proceeding generous discovery privileges were given petitioners in order that they might be permitted to find evidence in support of their allegations. What followed may best be characterized as an extensive "fishing expedition" which produced nothing of importance.

The attorneys for petitioners here have been unable to give this court any indication or assurance that further discovery in these proceedings will be any more fruitful or that they intend to explore any new sources of information. It appears, therefore, that the discovery requested would only harass the Internal Revenue Service and delay the proceedings.

The renewal motion to quash the subpoena duces tecum in each of the above entitled proceeding is, therefore, denied.

Petitioners' request for further discovery is likewise denied, and

IT IS FURTHER ORDERED that the record as it relates to the proceedings of this court, conducted under the authority and the order of the circuit of appeals, filed September 10, 1968, be forwarded to the clerk of the circuit court of appeals for its use in whatever manner it deems proper.

Dated: Feb. 26, 1969.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX E.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Joseph R. Bolker, President of Walpole Estates, Inc., Joseph R. Bolker, Appellant, vs. United States of America, Appellee. No. 23,178.

October 31, 1969

Appeal from the United States District Court for the Central District of California

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH*, District Judge.

DUNIWAY, Circuit Judge:

These three cases were separately briefed but were argued together because they all present similar questions. In No. 23,173, petitioner Lampman seeks a writ directing the District Court to set aside an order deny-

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

ing a motion to quash a subpoena, and to grant the motion to quash. Lampman has not appealed from the order denying his motion to quash. In Nos. 23,177 and 23,178, Lewis and Bolker have appealed from orders denying their motions to quash subpoenas.

In each case, the basic facts are similar. Each individual petitioner or appellant is an officer of a corporation. Each was served with a subpoena, directing him to appear before a Federal Grand Jury and to bring with him certain records of the corporation. Each corporation had previously been served with an administrative summons issued by the Internal Revenue Service (see 26 U.S.C. § 7602), and demanding the same records. Each had declined to comply. After various maneuvers, proceedings to enforce these summonses have not been pressed, and the District Court has denied motions to quash the Grand Jury subpoenas.

We conclude that the orders attacked are interlocutory, are not appealable, and are not such that we should seek to control the District Court's action under the All Writs Act (28 U.S.C. § 1651.) We therefore do not decide the questions that the parties seek to present.

1. *The orders are not appealable.*

In *Cobbledick v. United States*, 1940, 309 U.S. 323, the Court held that an order denying the motion of one subpoenaed to appear and produce documents before a Grand Jury to quash the subpoena is not a final appealable order. It affirmed a judgment of this court, dismissing such an appeal. No case cited to us indicates that *Cobbledick* is not still good law.[1]

[1] *Cobbledick* has been repeatedly cited by the Supreme Court in cases which follow the policy against piecemeal litigation on which

(This footnote is continued on the next page)

Our decision in *Continental Oil Co. v. United States*, 9 Cir., 1964, 330 F.2d 347, is not to the contrary. That case also concerned the denial of a motion to quash Grand Jury subpoenas. We order the subpoenas quashed. As to our jurisdiction, we said: (p. 349)

> "We have concluded that the appellants-petitioners are entitled to relief either by way of appeal, see *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950, *Schwimmer v. United States*, 8 Cir., 232 F.2d 855, or by way of mandamus or prohibition, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, *Atlass v. Miner*, 7 Cir., 265 F.2d 312, *United States v. Cobb*, 9 Cir., 328 F.2d 115."

We did not decide which. And apparently *Cobbledick* was not called to our attention. We think that, in view of *Cobbledick*, we should treat *Continental Oil* as a case in which we granted relief under the All Writs Act.

2. *Relief under the All Writs Act is not appropriate here.*

Every consideration relating to piecemeal litigation and delay of Grand Jury proceedings on which the Supreme Court rested its decision in *Cobbledick* is equally applicable when we consider whether to exercise our jurisdiction under the All Writs Act. The Supreme Court so indicated in *Will v. United States*, 1967, 389

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it rests. *E.g., Will v. United States*, 1967, 389 U.S. 90, 96; *DiBella v. United States*, 1962, 369 U.S. 121, 124; *Parr v. United States*, 1956, 351 U.S. 513, 518. See also *Thornton v. Corcoran*, D.C.Cir., 1969, 407 F.2d 695, 697; *Stewart v. Bishop*, 8 Cir., 1968, 403 F.2d 674, 678.

U.S. 97-98. In *Will,* the Court cautions against use of the writ as a means of reviewing an interlocutory non-appealable order, especially in a criminal case. We are told to limit its use to exceptional cases amounting to judicial usurpation of power. And we can find no such circumstances here. Whether, in the light of *Will,* we would decide *Continental Oil* in the same way today, we need not decide.

In Nos. 23,177 and 23,178, the appeals are dismissed. In No. 23,173, the petition is denied.

APPENDIX F.

Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the General District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

Filed, Dec. 2, 1969.

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH, District Judge.

The opinion in these cases is modified by striking the sentence appearing at lines 8 and 9, page 3 of the slip opinion reading as follows: "And apparently *Cobbledick* was not called to our attention." and substituting the following sentence: "*Cobbledick* was called to our attention in that case but was not cited or discussed in the opinion."

The petitions for a rehearing filed on November 12 and 13 are denied.

No active judge of the court has voted to hear the matter in banc. The suggestion of a hearing in banc is rejected.

APPENDIX G.

"Rule 6. The Grand Jury

"(a) *Summoning Grand Juries.* The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

"(b) *Objections to Grand Jury and to Grand Jurors.*

"(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

"(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

* * *

"(d) *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

"(e) *Secrecy of Proceedings and Disclsoure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.",

"Rule 17. Subpoena

* * *

"(c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein,

The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Application of Kelly, 19 F.R.D. 269	8
April 1956 Term Grand Jury, In re, 239 F. 2d 263	8
Cobbledick v. *United States*, 309 U.S. 323	5
Okla. Press Pub. Co. v. *Walling*, 327 U.S. 186	6
See v. *City of Seattle*, 387 U.S. 541	6
United States v. *Culver*, 224 F. Supp. 419	6, 8
United States v. *Gifford-Hill-American, Inc., et al.*, No. 515, this Term	8, 9
United States v. *Invader Oil Corp.*, 5 F. 2d 715	8
United States v. *Morton Salt Company*, 216 F. Supp. 250, affirmed, 382 U.S. 44	6
Will v. *United States*, 389 U.S. 90	5, 9
Constitution and rules:	
U.S. Constitution, Fourth Amendment	6
Federal Rules of Criminal Procedure:	
Rule 17(a)	2, 6
Rule 17(c)	6

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1014

OWEN B. LAMPMAN AND THRIFTIMART, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, AND JESSE W. CURTIS, A JUDGE THEREOF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as modified following a petition for rehearing (Pet. App. E, pp. 14–17; Pet. App. F, p. 18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1969 (Pet. App. E, pp. 14–17). A petition for rehearing was denied on December 2, 1969 (Pet. App. F, p. 18). The petition for a writ of certiorari was filed on December 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

375-384—70

QUESTION PRESENTED

Whether the court of appeals properly denied a petition for a writ of mandamus directing the district court to set aside its order denying a motion to quash a subpoena duces tecum for production of corporate books and records before a grand jury.

RULE INVOLVED

Rule 17(a) of the Federal Rules of Criminal Procedure provides as follows:

> (a) *For Attendance of Witnesses; Form; Issuance.* A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

STATEMENT

On August 9, 1968, petitioner Owen B. Lampman was served with a subpoena duces tecum (R. 48) directing him to appear before a grand jury, Central District of California, on August 19, 1968, and to produce the following books and records of Thriftimart, Inc., for fiscal years ending in March, 1963 to 1967 (exclusive of books and records of Smart and Final Iris Company and other subsidiaries of Thriftimart, Inc.): (1) Minute Books; (2) General Ledgers; (3) Ac-

counts Payable Ledgers; (4) Voucher and/or Check Registers for Payments of General Operating Expenses, Excluding Payroll Payments; (5) General Journal Adjusting Entries; (6) Schedules Showing Reconciliation of Book Income and Expenses to Reported Income and Expenses Per Form 1120; (7) Charts of Accounts; (8) Vendor Code Numbers; and (9) Organization Charts.

On August 14, 1968, the district court denied petitioners' motion for a stay of time for the witness to appear before the grand jury or in the alternative to have the subpoena quashed (Pet. App. A).

Following the filing of a petition for a writ of mandamus in the court of appeals on August 16, 1968, Circuit Judges Barnes and Ely, in an order filed September 10, 1968, stayed compliance with the subpoena and, in addition, authorized the district court to conduct any further hearings which, upon motion of the petitioners, it might choose to conduct and which might afford the court of appeals a more complete record upon which to rest its disposition of the matter. (Pet. App. B, pp. 2–7; R. 9–14). Pursuant to that order, petitioners on September 16, 1968, filed in the district court a renewed motion for order or orders with respect to the subpoena duces tecum, including an order permitting them to file a motion to quash the subpoena (R. 4–5).

On November 14, 1968, pursuant to authorization by the district court, petitioners filed a motion to quash the subpoena and for other orders related thereto, including an order for implementation of the record (R. 20–23). On November 25, 1968, the government

filed its opposition to petitioners' motion, together with an affidavit of Department of Justice Attorney Donald A. Hansen and a memorandum of points and authorities (R. 26–42).

Due to the imminent expiration of the life of the grand jury before which the subpoena duces tecum was returnable, a stipulation was entered into on December 5, 1968, providing that, if acceptable to the court of appeals, the expiration of the grand jury's life would not cause the litigation to become moot and that it would not be necessary for the government to have a new subpoena issued to petitioner Lampman (R. 44–47).

On December 9, 1968, the district court issued an order granting petitioners' motion to make a more complete record on appeal (Pet. App. C, pp. 8–10). It provided for the filing of a motion to quash and supporting affidavits and for the filing thereafter of an opposition by the government. Pursuant to that order, an affidavit of Willam J. Currer, Jr., attorney for petitioners, was filed on December 23, 1968, in support of the motion to quash the subpoena. See Supplemental Record on Appeal. On December 31, 1968, the government filed a renewed opposition to the motion to quash the subpoena (R. 54–55). The renewed opposition relied upon the government's November 25, 1968, opposition to the motion to quash and the affidavit of Donald A. Hansen and the memorandum of points and authorities in support of the opposition (R. 26–42).

On February 26, 1969, the district court denied the renewed motion to quash the subpoena duces tecum

and ordered that the record of the district court proceedings be forwarded to the Clerk of the Court of Appeals (Pet. App. D, pp. 11–13).

The opinion of the court of appeals (Pet. App. E, pp. 14–17), denying the petition for a writ of mandamus, consolidated this case with the similar case of *Gershon L. Lewis* v. *United States*, which is pending before this Court on a petition for certiorari in No. 1020. The court held that the orders of the district court were interlocutory and not appealable, citing *Cobbledick* v. *United States*, 309 U.S. 323, and were not such that the court of appeals should seek to control the district court's action under the All Writs Act (28 U.S.C. 1651), citing *Will* v. *United States*, 389 U.S. 90.

ARGUMENT

Petitioners apparently are alleging, in substance (Pet. 3–4), that the subpoena duces tecum was unreasonable; that its issuance was unlawful because it was issued without the knowledge or authorization of the grand jury or the district court; that the government proposes to violate the secrecy of the grand jury by having the subpoenaed records examined for the grand jury by agents of the Internal Revenue Service; and that the government proposes to have unauthorized persons present while the grand jury is in session. There is no merit to any of these contentions.

As set forth in the affidavit of Donald A. Hansen, Special Attorney, Department of Justice (R. 27–29), the subpoena duces tecum was prepared by him and was issued in connection with a grand jury investigation, duly authorized by the Department of Justice,

concerning the making of political campaign contributions and the treatment of such contributions for federal income tax purposes. The subpoena was prepared and issued in accordance with the provisions of Rule 17(a), Federal Rules of Criminal Procedure. Contrary to petitioners' apparent contentions (Pet. 3, 7), it is not necessary that an inquiry be initiated by a grand jury before a subpoena to produce records for consideration by it may be issued. *United States* v. *Culver*, 224 F. Supp. 419, 432 (D. Md.); *United States* v. *Morton Salt Company*, 216 F. Supp. 250, 257 (D. Minn.), affirmed, 382 U.S. 44.

With respect to the production of corporate books and records in response to a subpoena, the Fourth Amendment to the Constitution requires only that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The gist of the protection is the requirement that the disclosure sought shall not be unreasonable. *See* v. *City of Seattle*, 387 U.S. 541, 544; *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208–209. This requirement is recognized in Rule 17(c), Federal Rules of Criminal Procedure (Pet. App. G, p. 20), which provides that the court on motion may quash or modify a subpoena if compliance would be unreasonable or oppressive.

The subpoenaed books and records of Thriftimart, Inc., are needed by the grand jury for the purpose of determining what political campaign contributions were made by Thriftimart and whether such contributions were expensed by the corporation in its books and deducted unlawfully on its income tax returns.

The subpoena described the books and records with specificity and particularity. That the subpoena is reasonable in scope, and that the books and records it calls for are relevant to the purpose of the investigation, is shown by the affidavit of Donald A. Hansen (R. 27–29). The affidavit refers to information submitted by the Internal Revenue Service which indicates that political contributions of various corporations and businesses have not been reflected on their books as such, but have been disguised in books and records in such forms as advertising expenses, printing costs, legal fees, trade association dues, and miscellaneous expenses.

As stated in the affidavit of Donald A. Hansen (R. 27–29), the books and records of Thriftimart called for in the subpoena duces tecum will be examined only by the grand jury, attorneys of the Department of Justice, and agents of the Internal Revenue Service sworn as agents of the grand jury and authorized by it to examine the books and records, out of the presence of the jury, for the sole purpose of reporting to the grand jury and assisting the grand jury in its investigation. The books and records will remain in the custody of the grand jury and the United States Attorney and neither the books and records nor information obtained from them will be disclosed to unauthorized persons by the Department of Justice or its attorneys or by the agents of the grand jury. Agents of the Internal Revenue Service sworn as agents of the grand jury will not be present while the grand jury is in session except to the extent that one of them may be before the grand jury as a witness.

The proposed use of agents of the Internal Revenue Service as agents of a grand jury is consistent with long established practices of the Department of Justice in the conduct of inquisitorial grand jury investigations. When voluminous books and records are subpoenaed in such investigations, as here, it is necessary that the grand jury have the assistance of accounting experts who can examine and explain the books and records for the grand jury. Such practices have been sanctioned by the courts. See *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (C.A. 7); *United States* v. *Culver, supra*, p. 432; *Application of Kelly*, 19 F.R.D. 269 (S.D. N.Y.); *United States* v. *Invader Oil Corp.*, 5 F. 2d 715 (S. D. Cal.).

Petitioners suggest (Pet. 5–6) that the Court should consider this case in connection with the case of *United States* v. *Gifford-Hill-American, Inc., et al.*, No. 515 in this Court, in which certiorari was granted on the petition of the government on December 15, 1969. In that case, involving an antitrust prosecution, the Court of Appeals for the Fifth Circuit granted petitions for writs of mandamus directing (1) that the defendants may obtain grand jury transcripts as material documents in the possession of the government under Rule 16(b), Federal Rules of Criminal Procedure, and (2) that the defendant corporations may discover the grand jury testimony of all their present and former officers and employees concerning their corporate activities on the ground such testimony is the "recorded testimony of the defendant" within the meaning of Rule 16(a)(3) of those rules.

Contrary to the allegations of petitioners (Pet. 15), *Gifford-Hill-American, Inc.*, and the instant case deal with entirely different issues, and there does not appear to be any conflict between the decision of the Court of Appeals for the Fifth Circuit and the decision of the court of appeals in this case. The government petitioned for certiorari in *United States* v. *Gifford-Hill-American, Inc.*, No. 515, this Term, because of the importance to criminal law enforcement of questions concerning the construction of the discovery provisions of the recently revised Federal Rules of Criminal Procedure. No such important questions have been raised by petitioners. Moreover, the government has suggested the mootness of the *Gifford-Hill-American, Inc.*, case in a memorandum filed with this Court.

Petitioners have not shown any extraordinary cause for issuance of a writ of mandamus. In *Will* v. *United States*, 389 U.S. 90, 95–96, this Court stated that the writ of mandamus has traditionally been used only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so; that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy; and that a party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. The Court further stated (p. 104) that the extraordinary writs do not reach to cases where the district court may have erred on matters within its jurisdiction

and that the writs may not be used to thwart the congressional policy against piecemeal appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 1014

OWEN B. LAMPMAN and THRIFTIMART, INC., a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Rehearing on Denial of Writ of Certiorari (Rule 58).

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SUBJECT INDEX

Page

I.

Intervening Circumstances 2

A. Certiorari Has Been Granted in Donaldson v. United States 2

B. If Donaldson Prevails, Then Lampman and Thriftimart Should Prevail 3

C. The Constitutional Limitations on the Administrative Summons or Subpoena Should Apply Equally to Rule 17, FRCrP 5

II.

Other Substantial Grounds Available to Petitioners but Not Previously Presented 7

III.

Conclusion 20

TABLE OF AUTHORITIES CITED

Cases	Page
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964)	3, 5, 6
Arnold v. North Carolina, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964)	9
Badders v. United States, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916)	12
Bain, Ex parte, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)	11
Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 2d 98 (1962)	12
Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1918)	9
Brown v. United States, 59 U.S. 41, 79 S.Ct. 539, 3 L.Ed. 2d 609 (1959)	10
Bush v. Commonwealth of Kentucky, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883)	8
Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967)	3, 5, 6
Cammer v. United States, 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956)	12
Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950)	8
Commonwealth of Virginia, Ex parte, 100 U.S. 319, 25 L. Ed. 667 (1880)	8
Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)	12, 14
Cuircio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957)	10
Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966)	12

Page

Dugan and McNamara, Inc. v. United States, 153 F.Supp. 389 (U.S. Ct. of Claims, 1957) 14

Durbin v. United States, 94 U.S. App. D.C. 415, 221 F.2d 520 (1954) 16

Dymo Industries, Inc., In re, 300 F.Supp. 532 (D.C. N.D. Cal., 1969) 16

Eubanks v. State of Louisiana, 356 U.S. 584, 76 S.Ct. 970, 2 L.Ed. 2d 991 (1958) 9

Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L. Ed. 652 (1906) 9

Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) 11

Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L.Ed. 1101 (1910) 12

Harris v. United States, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965) 10

Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942) 8

Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 11

Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) 12

Hyde v. United States, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912) 13

Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) 11

Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L. Ed.2d 25 (1967) 9

Lang v. New Jersey, 209 U.S. 467, 28 S.Ct. 594, 52 L.Ed. 894 (1908) 12

Page

Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) 12, 14

Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) 10

Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892) 12

Martin v. Beto, 397 F.2d 741 (5 Cir., 1968) 14

Michael, In re, 326 U.S. 224, 66 S.Ct. 78, 90 L. Ed. 30 (1945) 10

Michel v. State of Louisiana, 350 U.S. 91, 76 S. Ct. 158, 100 L.Ed. 83 (1955) 13

Neal v. Delaware, 103 U.S. 393, 26 L.Ed. 567 (1880) 8

Norris v. State of Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074 (1935) 9

Oliver, In re, 333 U.S. 257, 68 S.Ct. 499, 92 L. Ed. 682 (1948) 10

Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947) 8

People of the State of New York v. O'Neill, 359 U.S. 1, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959) 13

Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918) 12, 14

Piemonte v. United States, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed. 2d 1028 (1961) 10

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959) .. 11

Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955) 9

Regan v. People, 349 U.S. 58, 75 S.Ct. 585, 99 L.Ed. 883 (1955) 10

Page

Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508 (1964) 2, 3, 5, 6

Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878) 13

St. Pierre v. United States, 319 U.S. 14, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) 10

See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967) 3, 5, 6

Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) 11

Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) 9

Smith v. State, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940) 8

Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959) 13, 17

Stevens v. Marks, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966) 10

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 11

Stout v. People etc., 13 Wall. (80 U.S.) 474, 20 L.Ed. 512 (1872) 7

Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880) 8

Sullivan v. United States, 348 U.S. 170, 75 S.Ct. 182, 99 L.Ed. 210 (1954) 12

United States v. Invader Oil Corporation, 5 F.2d 715 (9 Cir., 1925) 15

United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943) 12

Page

United States v. Morton Salt Company, 216 F.Supp. 250 (D.C. Minn., 1962) 15

United States v. Powell, 379 U.S. 48, 85 S.Ct. 248 (1964) 2

United States v. Proctor and Gamble Company, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) .. 11

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) 11

United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) 9

Whitus v. State of Georgia, 385 U.S. 545, 87 S. Ct. 643, 17 L.Ed.2d 599 (1967) 9

Wilson v. United States, 221 U.S. 361, 31 S.Ct. 358, 55 L.Ed. 771 (1910) 9

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962) 11

Rules

Federal Rules of Criminal Procedure, Rule 16 4

Federal Rules of Criminal Procedure, Rule 17 ....4, 6

Federal Rules of Criminal Procedure, Rule 17(c) 4, 5, 6

Rules of the Supreme Court of the United States, Rule 58(2) 1

Statute

United States Constitution, Fifth Amendment 13

IN THE

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OWEN B. LAMPMAN and THRIFTIMART, INC., a corporation,

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vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Rehearing on Denial of Writ of Certiorari (Rule 58).

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Owen B. Lampman and Thriftimart, Inc., petition this Court for rehearing of the order denying their Petition for Writ of Certiorari made by this Court February 24, 1970. This Petition is made on the grounds permitted by Rule 58(2), to wit:

A. Intervening circumstances of substantial and controlling effect.

B. Substantial grounds available to petitioners though not previously presented.

I.

Intervening Circumstances.

A. Certiorari Has Been Granted in Donaldson v. United States.

Kevin L. Donaldson, Etc. v. United States of America and John P. Grady, et al., October Term, 1969, Number 942, arose out of the objection of Donaldson to an Internal Revenue Service summons and enforcement proceedings commenced by the Service seeking to enforce the summons. Among other things, the opposition to the summons was based upon the claim that the summons was for an improper purpose, that is to say, it sought to obtain evidence for use in a criminal prosecution. Apparently the summons was broad and unlimited in scope and did not state the things to be seized or the purpose of the seizure. Petitioner relied upon *Reisman v. Caplin,* 375 U.S. 440, 449-450, 84 S.Ct. 508, 513 (1964). The United States in its Memorandum did not oppose the granting of certiorari and the Solicitor General in his Memorandum has pointed to a dispute with respect to the meaning of the Court's language in *Reisman, supra,* and its reference to the right to judicial review of an administrative summons which is issued for an improper purpose.

United States v. Powell, 379 U.S. 48, 58, 85 S. Ct. 248 (1964).

Thus the Solicitor General states in his Memorandum that since the question of "improper purpose" is presented by the *Donaldson* case and since in most criminal

investigations in which the Internal Revenue Service seeks enforcement of the summons it is compelled to argue and litigate the contention of the respondent or intervenor that the summons was improper, certiorari should be granted to settle the issue. In *Donaldson* the Court granted certiorari February 27, 1970.

B. If Donaldson Prevails, Then Lampman and Thriftimart Should Prevail.

As the Solicitor General has stated, in most summons enforcement proceedings, the Internal Revenue Service is met with the argument that the summons was improper, citing *Reisman v. Caplin, supra.* We do not doubt this for a minute, judging by the summons in this case. That summons was improper for the reason that it sought a re-examination of the books and records of Thriftimart, Inc., for certain years without cause, it was general and included virtually every scrap of paper of the company for the years sought to be re-examined, it was issued to permit the Special Agent to examine to find any crime he could find, a purpose defined as improper by *Reisman, supra,* and it sought to circumvent the limitations imposed by statute, the Constitution and this Court's determinations in *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727 (1967), *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737 (1967), and *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (1964). The Internal Revenue Service did not seek to enforce that summons. It conceded by its failure to follow enforcement procedures that the summons was improper.

But that did not prevent its immediately turning to a *subpoena duces tecum* under the guise of a "grand

jury" investigation whereby the same books and papers sought by the summons are to be turned over to the same agents of the Internal Revenue Service, the United States Attorney and representatives of the Attorney General. By simply turning to Rule 17(c), FRCrP, and using the "grand jury" as its own discovery device, the Internal Revenue Service seeks to do indirectly what it cannot do directly. To do this, of course, it must manipulate and abuse the entire grand jury process.

The importance and significance of this is that if the Court were to decide *Donaldson, supra,* in favor of the peetitioner Donaldson, or further define improper use of the summons procedure so as to compel the Internal Revenue Service to abide by the law and the Constitution, it would only mean that the decision of this Court would be circumvented by the supposed and pretended use of a "grand jury subpoena", issued without the grand jury's knowledge, filled in by a prosecutor after issuance in blank under Rule 17, FRCrP.

We say, therefore, that if the Court is to define and establish the appropriate limits of searches and seizures under an Internal Revenue Service summons, it must in view of the conduct exhibited in the *Lampman* case (and the companion *Lewis* case, October Term, 1969, Number 1020) also consider and determine the abuse of the subpoena duces tecum process, the relationship of Rule 17(c) to the new discovery Rule 16 of the Federal Rules of Criminal Procedure. Thus the Court has granted certiorari in *Donaldson* and *United States v. Gifford-Hill-American, Inc.* If the problem is to be properly decided so that it is not the subject of piecemeal litigation and piecemeal appeals, certiorari should be granted in this case also so that the entire problem will

be before the Court. The Government expresses horror at piecemeal appeals, but by resisting our petition for certiorari, it is seeking piecemeal litigation which amounts to the same thing.

We respectfully submit that certiorari having been granted in *Donaldson* and the *Gifford-Hill-American* cases, certiorari should be granted in this case.

C. The Constitutional Limitations on the Administrative Summons or Subpoena Should Apply Equally to Rule 17, FRCrP.

The fundamental reasons for the limitations on the administrative summons or subpoena including the summons of the Internal Revenue Service are found in the searches and seizures clause of the Constitution. The searches and seizures clause must be applied to all alike by reason of the equal protection clause.

See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967);

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967);

Reisman v. Caplin, 375 U.S. 440, 449, 84 S.Ct. 508, 513 (1964).

Certainly the same limitations must apply to 17(c), FRCrP. If the Government and any of its agents may use 17(c), FRCrP as an omnibus search and seizure provision with their own agents examining the material searched and seized by the *subpoena duces tecum* and by holding the material searched and seized in the possession of the United States Attorney, then all the lofty rhetoric in *See, Camara, Reisman, supra,* cases involving warrants like *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (1964), is meaningless. In fact if the Government

can do what it claims it can do under Rule 17(c) and what it is now attempting to do in this case, there is no longer any reason for the constitutional limitations on searches and seizures nor is there any real reason for the grand jury to exist. We should at least be honest about it and simply abolish these troublesome constitutional ideals.

If this Court really intends to open the flood gates to permit any kind of search and seizure imaginable, with or without even the ordinary protections concerning description, purpose and relevancy accorded a *subpoena duces tecum* in a civil case, it will deny this petition and also reverse its order granting certiorari in *Donaldson*. To hold in a case like *Donaldson* that improper summonses may not be issued is meaningless unless the Court also holds that 17(c), FRCrP is limited to a proper purpose based on a proper showing as required by *See, Camara, Reisman* and *Aguilar, supra.*

This use of 17(c), FRCrP is of course contrary to the true intent and purpose of the rule. The rule was not intended as a discovery device. It was intended obviously and solely as a means of producing trial evidence at trial. It was never intended to be used as an all-encompassing omnibus method of discovery to be used by the prosecutor without limit. 17(c) does not in fact even suggest that it is to be used other than for a court proceeding. The record shows that the subpoena in this case was not returnable to the grand jury but to a Government agency office. The record in this case and Mr. Hansen's affidavit in particular show that 17 FRCrP was used solely to circumvent the defective summons which Special Agent Frank Andy had issued in the field.

We submit that the granting of certiorari in *Donaldson* and denying certiorari in this case will not only prevent consideration by this Court of the actual problem before the Court but it will also work a grave injustice upon the petitioners in this case.

II.

Other Substantial Grounds Available to Petitioners but Not Previously Presented.

We are convinced that there should be an expression by this Court of the true role of the grand jury in the federal system of criminal justice. As matters now stand the grand jury is simply not permitted to function as it was intended to function at the time of the adoption of the Constitution.

With the exception of the discrimination cases and cases involving bias and some unusual circumstances, the grand jury cases considered by this Court have primarily emphasized the function of the grand jury as a "grand inquest, a body with power of investigation and inquisition."

The emphasis on inquisition has led not to the inquisition of the grand jury, but inquisition by the prosecutor wih the protective function destroyed and the inquisitorial function usurped.

We attribute this result to the fact that the first case decided by this Court directly involving a grand jury was decided in 1872, almost one hundred years after the adoption of the Constitution.

> *Stout v. People etc.*, 13 Wall. (80 U.S.) 474, 20 L.Ed. 512 (1872).

By that time the industrial revolution was well on its way and government regulation of business commenced.

They felt necessity of that time was the grand inquisition.

This was a departure from the purpose of the grand jury as a protective body. The original purpose and function of the grand jury as a protector is well stated by Mr. Justice Field in his famous charge.

> Charge of Mr. Justice Field, The Grand Jury, San Francisco, 30 Fed. Cas. 18,255, 1872, page 992.

We believe that a classification of the grand jury cases decided by this Court and the effect they have had on the lower courts and prosecutors will show the need to consider this problem as it is presented in this case.

The Court has held that discrimination (originally by law and later by practice) in the racial composition of a grand jury is unconstitutional.

> *Strauder v. State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880);
>
> *Ex parte Commonwealth of Virginia*, 100 U.S. 319, 25 L.Ed. 667 (1880);
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> *Neal v. Delaware*, 103 U.S. 393, 26 L.Ed. 567 (1880);
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> *Bush v. Commonwealth of Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883);
>
> *Smith v. State*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940);
>
> *Hill v. State of Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942);
>
> *Patton v. State of Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947);
>
> *Cassell v. State of Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950);

Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955);

Eubanks v. State of Louisiana, 356 U.S. 584, 76 S.Ct. 970, 2 L.Ed. 2d 991 (1958);

Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed. 2d 634 (1967);

Whitus v. State of Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967);

Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967);

Arnold v. North Carolina, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964);

Norris v. State of Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074 (1935).

These cases involving discrimination recognize the protective function of the grand jury. When the Court has considered the production of books, papers and records, the Court has emphasized in the extreme the virtual right of the prosecutor to use the grand jury as his discovery tool in spite of the fact that this itself destroys the independence of the grand jury and its true constitutional function.

Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L. Ed. 652 (1906);

Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1918).

See also *Wilson v. United States,* 221 U.S. 361, 31 S.Ct. 358, 55 L.Ed. 771 (1910);

United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), (involving the books and records of an unincorporated association, *i.e.*, a union).

The Court has held that contempt proceedings were inappropriate where the witness refused to disclose the whereabouts of union books and records since the *subpoena duces tecum* required only the production of such books and records but could not compel the petitioner to reveal the contents of his mind.

Cuircio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957).

The Court has held that one may be compelled to testify before a grand jury after refusing on grounds of self-incrimination where the witness was granted immunity.

Brown v. United States, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959);

Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960);

Piemonte v. United States, 367 U.S. 556, 81 S. Ct. 1720, 6 L.Ed.2d 1028 (1961).

These cases were overruled, however.

Harris v. United States, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965).

Other miscellaneous waiver and contempt cases are:

Regan v. People, 349 U.S. 58, 75 S.Ct. 585, 99 L.Ed. 883 (1955);

Stevens v. Marks, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966);

St. Pierre v. United States, 319 U.S. 14, 63 S.Ct. 910, 87 L.Ed. 1199 (1943);

In re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L. Ed. 30 (1945);

In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

In *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), the Court upheld the right to refuse to testify before a grand jury on the grounds of self-incrimination and noted the protective function of the grand jury and certain limitations on investigation.

See also:

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962);

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960);

Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887);

Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) (dissenting opinion);

Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969);

Shillitani v. United States, 384 U.S. 364, 86 S. Ct. 1531, 16 L.Ed.2d 622 (1966).

Use of the grand jury as the tool of the prosecutor (unsuccessful and successful) is found in:

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed 1129 (1940);

United States v. Proctor and Gamble Company, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958);

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959).

Occasionally the use of the grand jury as a private discovery tool of the prosecutor has been too much for the Court.

See:

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

Occasionally, the Court has found bias on the part of the grand jury.

Cammer v. United States, 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956);

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

Various procedural and other matters have been raised and considered by the Court.

Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918);

Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956);

Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910);

Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958);

Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892);

Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L.Ed. 1101 (1910);

Badders v. United States, 240 U.S. 391, 36 S. Ct. 367, 60 L.Ed. 706 (1916);

United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943);

Sullivan v. United States, 348 U.S. 170, 75 S.Ct. 182, 99 L.Ed. 210 (1954);

Lang v. New Jersey, 209 U.S. 467, 28 S.Ct. 594, 52 L.Ed. 894 (1908);

Hyde v. United States, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912);

Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878);

Michel v. State of Louisiana, 350 U.S. 91, 76 S. Ct. 158, 100 L.Ed. 83 (1955);

People of the State of New York v. O'Neill, 359 U.S. 1, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959).

The thrust of petitioner's argument goes not to the inquisitorial function and the broad powers of the grand jury granted by the Fifth Amendment, but rather, to the usurpation of these powers by the Government which in effect destroys the concomitant and equally important function of the grand jury as a protector of the people from the prosecutorial powers of the Government.

See *Smith v. United States,* 360 U.S. 1, 79 S.Ct. 991; 3 L.Ed.2d 1041 (1959) in addition to the previously cited cases upholding this proposition.

In essence, the argument of the petitioner is that this problem is greater than the sum of its parts. Respondent has cited in its brief cases which uphold the right of the Government to take each of the actions which occurred in this case. Other cases cited, *infra,* demonstrate that not only these, but also, other actions by Government agents which used the powers of the grand jury have been sanctioned by the courts.

The following is an illustrative, but not exhaustive, group of cases demonstrating the practices engaged in

by the Government and upheld by the courts. Grand jury subpoenas were issued by an assistant district attorney who signed the name of the grand jury foreman to them.

Martin v. Beto, 397 F.2d 741 (5 Cir., 1968). Indictment based entirely upon hearsay;

Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L.Ed. 397 (1956).

The suspicion that the prosecution was using illegally obtained evidence to secure a grand jury indictment where a previous indictment had been dismissed because of the source of the same evidence was held to be groundless.

Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958).

The United States Attorneys' Office obtained evidence from the court which had retained possession of evidence presented in a civil action which was subsequently dismissed in order to present the evidence to a grand jury and obtain a perjury indictment.

Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918).

After a motion to suppress evidence illegally obtained by the United States Government was granted in criminal proceeding, the Government obtained a *subpoena duces tecum* from a grand jury in order to obtain the same evidence to be used in a civil action.

Dugan and McNamara, Inc. v. United States, 153 F.Supp. 389 (U.S. Ct. of Claims, 1957).

The Government obtained issuance of a grand jury *subpoena duces tecum* by the Clerk of the Court while

the grand jury was in recess and before a new grand jury had been summoned.

United States v. Morton Salt Company, 216 F. Supp. 250 (D.C. Minn., 1962).

The Government also cites case authority for the proposition that the grand jury may have the assistance of accounting experts to examine and explain books and records. An examination of these cases reveal the following factors (1) the proposition is stated as a general rule without the citation of any other case authority to support it; (2) the factual situations differ materially from the instant case; (3) the courts have imposed restrictions upon the methods used to examine the evidence by the investigators or have placed restrictions upon the ultimate use of such information.

Furthermore, in *United States v. Invader Oil Corporation,* 5 F.2d 715 (9 Cir., 1925), the court states that:

> "There is no authority in the court to direct that exhibits be delivered to investigators, although the grand jury, having before it a witness suitably qualified, may cause such witness to make his examination and report the facts; all the while the custody of the records so produced being that of the grand jury."

Thus the decisions in these lower court cases must be limited to the particular factual situation involved, such as anti-trust investigation which is not applicable here, or the power must be circumscribed and the procedural necessities must be observed in order to preserve the secrecy of the grand jury investigation which has not been done in the instant case.

Any argument upholding the right of Government agents to proceed as they have done which proceeds step by step pointing out case authority for the separate actions engaged in by these agents may often be supported by a decision upholding such action. In each instance the decision of a court affirming the right of the Government agents to proceed in a particular manner may be reasonable in relation to the administration and enforcement of the law as compared to the prejudicial effect it has on the opposing party in a particular case.

However, the cumulative effect of all the decisions is that bit by bit, step by step, and instance by instance, the inquisitorial and investigative powers of the grand jury have been assumed by agencies of the Government without the counterbalancing of an assumption of the concomitant and necessary protective powers of the grand jury. Although the proposition that the prosecuting agency may not use for its own purposes the processes available to the grand jury is stated in such cases as *In re Dymo Industries, Inc.*, 300 F.Supp. 532 (D.C. N.D. Cal., 1969) and *Durbin v. United States*, 94 U.S. App. D.C. 415, 221 F.2d 520 (1954), but few, if any, opinions have ever discerned such abuse.

The structure and organization of governmental agencies make it impossible for these units to adopt the protective function of the grand jury. The instigation of inquiry, the gathering of evidence and the prosecution of an action are functions which have become specialized, fractionated and divided among a host of governmental agencies. No single agency of the administrative branch of the Government has the responsibility or the power to review the entire case in perspective.

It is submitted that this latter function is that of the grand jury and the primary rationale for its existence.

An absolute prerequisite to the performance of this function is that the grand jury have access to all of the facts in the case.

> *Smith v. United States, supra,* (dissenting opinion).

The presentation of evidence to the grand jury by agents of the Government who have of necessity sifted and culled a vast body of information down to a manageable quantity which may be usefully presented to the members of the grand jury as anathema to the above stated principle. No employee of a governmental agency could conceivably conduct an investigation of a vast quantity of information without knowing the purpose of the investigation. Without such knowledge, any and every bit of data will be relevant to some investigative conclusion and therefore no winnowing of the information would be possible at all unless the purpose of the search were known to the investigator.

Such knowledge of the purpose of the investigation inevitably and inexorably exerts a pressure on an investigator to find every scrap of evidence which relates to the purpose of the investigation. For an investigator to do otherwise would be to fail in his duties. Petitioner hastens to add that no implication is being made that an investigator would neglect to include evidence which would tend to disprove any irregularity on the part of the party whose records were being examined. It is to be assumed that neither the employees nor the heads of governmental agencies would let their desire to prove a certain result influence the gathering of information.

It must be noted, however, that the investigator must of necessity submit some type of report or résumé concerning the investigation. It is, of course, the function of the grand jury to weigh the evidence in order to determine if a sufficient quantum of affirmative evidence has been presented to return an indictment. However, before the evidence is presented to the grand jury, the evidence is filtered through several layers of administrators within a given agency and then turned over to another agency for presentation. Although the evidence may be presented by a witness who was the original investigator and thus the same person is testifying, the information has passed through a process whereby it is focused on a few major points in order that the information be of a quantum which is manageable and organized in a manner which makes it capable of coherent presentation to a grand jury.

Also, it is a member of a different governmental organization who is directing the giving of the testimony and information may not necessarily be presented in the same light nor to the same extent as was contemplated by the investigative agency. Thus, by necessity, a grand jury does not have all of the evidence presented to it.

It is not the argument of petitioner that it is to be presumed that a governmental agency has abused its discretion or neglected its duties, but rather that the potential for abuse or neglect is patently present and that this runs counter to our system of government which is predicated on the system of checks and balances.

As the Constitution itself is drafted, no one branch of government is free to exercise its powers unchecked.

This prevents not only the conscious and deliberate usurpation of power by one branch of the government, it wisely provides a check on the overzealous or erroneous encroachment by one branch of government on the powers of another branch.

Therefore, it is the contention of petitioner that the time has long since come and passed when the gradual and almost imperceptible trend of the erosion of the powers of the grand jury must be stopped. As it stands now, the grand jury is a hollow shell of an institution, bereft of its independence and powerless to exercise its protective function by a weighing of evidence presented by impartial witnesses and experts.

Petitioner therefore respectfully urges this Court to begin immediately the process of reversing this ignominious trend and restoring the grand jury to its necessary independence by refusing to allow the wholesale distribution of *subpoenas duces tecum* in blank by the clerk of the court to be filled in by any governmental agency with the opportunity and the inclination to have the broad inquisitorial and investigative powers of the grand jury or to gratuitously bestow these powers on any other governmental agency merely by having the *subpoena duces tecum* issued in its name in order to aid another agency which does not have the prerogative of issuing such a subpoena itself.

Such a decision would of course represent only the first tentative steps in reversing the erosion of the powers of the grand jury. But it would serve notice that the grand jury as an independent institution is not powerless and obsolete.

III.

Conclusion.

We pray the Court that it grant this Petition for Rehearing of the order denying certiorari, that it grant certiorari, and that *Donaldson, Lewis* and this case be heard together.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioners, Owen B. Lampman and Thriftimart, Inc.

Certificate of Counsel.

I, WILLIAM J. CURRER, JR., do hereby certify:

1. I am a member of the bar of the Supreme Court of the United States and duly enrolled upon the roll of attorneys and counsellors of that Court.

2. I represent before this Court Owen B. Lampman and Thriftimart, Inc.

3. I have prepared the foregoing Petition for Rehearing and it is presented in good faith and not for delay.

4. The said petition is restricted to the grounds specified in Rule 58(2).

5. My manuscript signature has been manually signed by me on one of the forty copies of the said petition and this certificate filed with the clerk as required by Rule 58.

Dated: March 5, 1970.

WILLIAM J. CURRER, JR.,
Counsel for Owen B. Lampman and Thriftimart, Inc.